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No. 488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOHN J. CZAP, JR.,

Petitioner,

v.

JAMES A. MARSHALL, WILLIAM P. SCHMITT, HAROLD ALFRED BASTRUP, RICHARD ROE and THE OHIO CASUALTY INSURANCE COMPANY, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on February 21, 1963.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Trial Court (U. S. District Court Eastern District of Wisconsin) is printed in appendix B hereto *infra*, page 3a. The opinion of the U. S. Court of Appeals for the Seventh Circuit is printed in appendix B hereto *infra*, page 8a, is reported in 315 Fed. (2d) 766.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on February 21, 1963. R. 170; p. 18a, *infra*. Rehearing was denied on May 8, 1963. App. 19a[1] The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTIONS PRESENTED.

1. Did the Trial Court and the Court of Appeals err in failing to follow *Monroe* v. *Pape*, 365 U.S. 194, 196, 81 S. Ct. 489 (1961) under R. S. 1979, U. S. C. 1983, where a citizen of the United States was arrested without a warrant, no offense taking place in the presence of the officers and the only information the arresting officers had prior to the arrest, was a call to their squad car "go to the Czap farm they are having trouble with the son" and after identifying himself, the son, petitioner, was arrested?

2. Is there a violation of constitutional and civil rights in failing to allow the petitioner herein to call his attorney and in failing to take him at any time before a magistrate, to furnish bail, with his release on Monday afternoon, some twenty-four hours after his arrest?

3. Can a state statute, exempting a sheriff from liability for acts of his deputy, except when acting under the express direction of the sheriff, exempt such sheriff for a violation of R. S. 1979, U. S. C. 1983?

4. On the evidence presented, did the Trial Court err in affirming the ruling of the Trial Court in directing a verdict for the defendants?

5. Has the state statute of limitations run against Ohio Casualty Insurance Co.

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[1] An order granting extension of time for applying for a writ of certiorari to and including September 25, 1963 was entered Aug. 6, 1963.

STATUTES INVOLVED.

The statutory provisions involved are R. S. 1979, 42 U. S. C. 1983, printed in Appendix A, page 1a, Wisconsin Statute 59.22(1)(2)(4) are printed in appendix A, page 1a, Wisconsin Statute of Limitations, 330.19(4); 330.20(1), 330.21(2) are printed in the appendix A.

STATEMENT OF FACTS.

The jurisdiction of the district court in the case at bar was invoked because of diversity of citizenship, the plaintiff being a resident of this State of Illinois and the defendant, resident of the State of Wisconsin, and because of a claimed violation of section RS 1979, 42 UCA #1983, by the defendant, and under Title 28 USC 1343, 1331.

This action was brought by the plaintiff, John Czap, Jr., to recover damages against the defendant, James A. Marshall, then Sheriff of Kenosha County, Wisconsin, William P. Schmitt, his Chief Investigator, and Harold A. Bastrup then Deputy Sheriff and Ohio Casualty Insurance Company, the Surety Company on the bond of the defendants, Schmitt and Bastrup, for damages of the plaintiff, for his unlawful arrest, the subsequent confinement of the plaintiff in the Kenosha County Jail caused by the defendants and for the retention of certain credentials of the plaintiff. Damages are claimed for a violation of plaintiff's civil rights, R. S. 1979, sec. 42, U. S. C., sec. 1893. At the close of the testimony the court entered judgment on defendants' motion for a directed verdict against the plaintiff and in favor of all the defendants.

On March 13, 1955, the plaintiff, John Czap, Jr., had an interest in the family farm in Kenosha County for invested money in the personal property theron. Prior to

this date he had noticed an advertisement in a Chicago paper for an auction sale on the farm for March 13, 1955. He had procured a restraining order from a Kenosha County Court which was served on the parents the day prior to the sale and on Sunday he had gone to the farm premises in the company of a young woman to whom he was engaged. (Tr. 25).

Upon arrival at the farm plaintiff went into the house and had some discussion with the members of the family relative to the auction sale. (Ap. 36).

While in the house the sisters and John got into some oral discussion with the result that the sisters pushed the plaintiff and a brother-in-law persuaded the plaintiff to leave the house. (Ap. 36, 69).

While plaintiff was outside the house and visiting with his fiance and the auctioneer, Elfers, the Kenosha County Sheriff's car with the deputies, Bastrup and Schreck arrived. (Ap. 37). The deputies came up to the plaintiff and asked for identification which he furnished. (Ap. 37, 38). After the identification had been made, plaintiff was advised by the deputies that he was under arrest, (Ap. 38) and placed in the squad car. Deputy Bastrup then proceeded to the house. (Ap. 38). Upon the return of deputy Bastrup, Bastrup got into the rear seat with the plaintiff and the plaintiff was taken to the county jail where he was locked up. Plaintiff requested the deputies to allow him to furnish bond. No warrant had been issued for his arrest (Ap. 39) and at the time of the arrest there was no violation of any kind going on in the presence of the officers.

Plaintiff testified that it was officer Schmitt that confined him to the cell on Sunday afternoon. (Ap. 40).

Sheriff Marshall testified that he was at the jail a brief time on Sunday and then on Monday, he examined the

records of the arrest that had been made, that he knew that John Czap, Jr. had been brought into the county jail on March 13, that the Courts were open on Monday morning to take the plaintiff before a magistrate, that he made no effort to take the plaintiff before a magistrate. (Ap. 55). In the afternoon the plaintiff was released.

The defendant, James Marshall, testified that he was entirely familiar with the duties of the sheriff, that it is pretty much a 24 hour a day job, that the booking department is one of their departments and operates under the direct supervision of the sheriff, that the Chief Investigator, William Schmitt, operates under the sheriff, and under the express direction of the sheriff and that the matter of handling complaints operates under the express direction of the sheriff, that the procedure in the sheriff's office was adopted by the sheriff from the previous administration and it is followed by the sheriff. (Ap. 54).

At the time of the arrest, the only information available to the arresting officers as to the conduct of the plaintiff was a radio report from the sheriff's office, "we are having trouble with Mr. Czap's son, would like to have squad-car stop at the place." (Ap. 53).

No warrant was ever issued, no misconduct was taking place at the time of the arrest. Plaintiff was never taken before a magistrate. No opportunity to furnish bond was given.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the 7th Circuit in affirming the District Court judgment directing a verdict for the defendant and holding that *Monroe v. Pape*, 365 U.S. 194, 196, 81 S. Ct. 489 (1961) is not applicable is in direct conflict on the facts in the case at

bar with the holding of *Monroe* v. *Pape*, 365 U.S. 194, 196, 81 S. Ct. 489 (1961).

In *Monroe* v. *Pape*, 365 U.S. 194, 196, 81 S. Ct. 489 (1961) that complaint alleges that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on "open" charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him. It is alleged that the officers had no search warrant and no arrest warrant and they they acted under color of the statutes, ordinances, regulations, customs and usages of Illinois and of the City of Chicago.

In the case at bar the uncontradicted evidence shows that plaintiff was a citizen of the United States, that he was at his parents' farm home on Sunday, March 13, 1955, in connection with restraining the farm sale of the personal property of which he had an interest. There he was arrested by deputy sheriffs of Kenosha County acting under the custom, practice, regulations and usages of the State of Wisconsin and Kenosha County, without a warrant, and which officers immediately prior to the time of the arrest had received a radio call from the sheriff "to go to the Czap farm, they are having trouble with the son." Without any other information as to any offense by the petitioner; the officers arrived, petitioner was either standing near or sitting peaceably in his car and upon request, petitioner identified himself and was then taken into custody, placed under arrest and placed in the squad car in control of one

of the deputies while the other deputy went to the house and upon his return petitioner was taken to the Kenosha County Jail and locked up in a cell. Permission to call his attorney and make bail was refused. Search of his person, photographs and fingerprinting followed. Petitioner, at no time, was taken before a magistrate. The following day after approximately 24 hours confinement, petitioner was released, no charge having been placed. Three months later, petitioner's papers and credentials, which had been taken from him in the jail by the sheriff's office, were returned.

Under Wisconsin law on arrest, by which the federal court was bound, by *Erie Railroad* v. *Tompkins*, 58 S. Ct. 817, 304 U.S. 648, 82 L. Ed. 1488, *Peolquin* v. *Hibner*, 231 Wis. 77 page 84, 285 N.W. 380 quoting from 4 Am. Jur. para 2 page 5 the Court said:

> "An arrest is the taking, seizing or detaining of the person of another either by touching or putting hands on him or by any act which indicate an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest."

The above determination was made in the case of an arrest without a warrant and in response to the argument that plaintiff was simply detained for questioning and there was therefore a false imprisonment because there is no legal right of detention for the mere purpose of questioning, and the court there said that what happened constituted an arrest of the plaintiff without a warrant, that for the time being the plaintiff had been deprived of his liberty but by legal authority.

It follows that when the officers told the plaintiff that when he was placed under arrest and placed in a squad car by officer Schreck that an arrest took place.

The question now arises did the officers have grounds for making such arrest.

The record shows (Ap. 53) that the sheriff's office received a complaint by telephone from the auctioneer at the Czap place . . . they were having trouble with the son. Officers Schreck and Bastrup Sqd. 36 were assigned.

There is no indication in that complaint, which is the only information the officers had prior to the time that plaintiff was taken into custody, as to what was going on. There was no information given to the officers that a felony had been committed, nor did they have a basis for believing a misdemeanor had been committed.

See *Henry* v. *U. S.*, 80 Sup. Ct. 168, 361 U.S. 98.

The language of the Court of Appeals in its opinion finding that the petitioner had committed an offense in the presence of the officers is wholly without foundation in fact and contrary to all the evidence. Petitioner's rights under Amendments IV, V, VIII and XIV have been grossly violated.

It is important with the amount of civil rights litigation pending and developing, to litigants and to all law enforcement officers, that the trial court and court of appeals zealously follow the law of *Monroe* v. *Pape*, 365 U.S. 194, 196, 81 S. Ct. 489 (1961), and not be at liberty to decide whether such decision is to be followed.

2. Involved with the constitutional rights is the right to furnish bail. No opportunity was furnished Sunday after the arrest to furnish bail though requested. Petitioner, when taken to the jail Sunday afternoon, requested to be allowed to furnish bail. At no time was petitioner taken before a magistrate. The Eighth Amendment has been held to safeguard the right to give bail by necessary

implication and does not merely mean that when bail is allowed it shall not be excessive.

Trimble v. *Stone*, 187 Fed. S 483 (D.C. 1960).

Numerous court commissioners, empowered to grant bail, resided in Kenosha and in Kenosha County, as well as judges authorized to allow bail. The argument is made that the courts are not open on Sunday, referring to Wisc. Stats. 256.15.

Wisconsin Statute 256.15 provides as follows:

> "No court shall be opened or transact business on the first day of the week, the fourth day of July, Christmas or the day on which any general election shall be held unless it be for the purpose of instructing or discharging a jury or of receiving a verdict and rendering a judgment thereon; *but this section shall not prevent the exercise of the jurisdiction of any magistrate when it shall be necessary, in criminal cases, to preserve the peace or arrest offenders. . . .*" (Emphasis supplied.)

The Michigan Statute section 27.471 contains the same language as the Wisconsin Statute and has been construed by the Michigan Supreme Court in *State of Michigan* v. *Hamilton*, 102 N.W. 2d 738 at page 742, where the Court said:

> "It admits of no defense on account of the claimed intervention of the half and whole holidays of Saturday, Sunday and Monday. Hamilton should have been taken before a magistrate no later than Saturday afternoon, immediately following the confession of his co-defendant. And it will not do to say or infer that the magisterial courts of Wayne county were closed and remained so until the following Tuesday. Magistrates of Michigan are, for the purposes of said sections 13 and 26, on legal duty at all time; Sunday, holidays, or no. . . .

> "This construction of our rules of criminal procedure will bring them to necessitous concord with corresponding features of federal rule 5(a). Too, it will mean that constitutional due process means the same thing in Michigan, to an arrested person, whether he is charged or to be charged with violation of state or federal law. We have our own guarantee of due process."

Such construction should be given to the Wisconsin Statute, which we submit is in keeping with the preservation of a citizen's liberties and constitutional rights. Constitutional due process should be the same whether under state or federal law.

3. May a duly elected sheriff escape liability for the violation of a citizen's civil and constitutional rights, either because of violation by the sheriff himself, or by a violation by his deputies, because a statute exempts such sheriff from liability for acts of his deputies except where the deputy acts under the express direction of the sheriff.

The district court so held and was affirmed by the Court of Appeals for the Seventh Circuit.

Czap v. *Marshall*, 315 Fed. 2d 766.

It would seem that when a right and cause of action are created or granted by the federal law, that a state statute cannot limit its application.

In 11 American Jurisprudence, paragraph 42, page 649, it is said:

> "Since the Constitution of the United States provided (Article 6, p. 2) that the laws made in pursuance thereof shall be the supreme law of the land in connection with the Federal Constitution itself, such Federal Laws control the Constitutions and laws of

the respective states and cannot be controlled by them. They operate essentially as a part of the law of each state and are as binding on its authorities and people as its own local Constitution and laws in the same manner as if they were actually embodied in the Federal Constitution. Thus, the several states are subject to the supremacy of the laws made in pursuance of the Federal Constitution, and a state law is void if contrary to a valid act of Congress.

"Every judicial officer, whether of a state or of a Federal Court, is under the obligation of an oath to recognize the supremacy of valid acts of Congress.

"Congress has no power by authorization or ratification to give effect to a state law or Constitution not consistent with the Constitution of the United States."

It would appear that it would be of supreme importance to determine definitely to what extent an exemption from liability a state may impose upon an enforcement of citizen's rights under RS 1979, 42 USC 1983. If a state has such a power the benefits of RS 1979, 42 USC 1983 under federal law could be made an empty shadow by enactment of state legislation limiting the amount of recovery for such violations.

4. The trial court denied to the jury its proper function in passing on disputed questions of fact and by drawing inferences of proven facts, by granting defendant's motion for directed verdict and affirmed by the Court of Appeals.

As was stated by the court of appeals in *Reid* v. *Maryland Cas. Co.*, 5th C.A.C. 63 Fed. 2d 10:

"At the close of plaintiff's case, defendant moved for a verdict, and the plaintiff asked leave to reopen the case for additional testimony. The District Judge, stating that plaintiff impressed him as a man who

would not tell the truth, but rather as one who colored his testimony to meet the exigencies of his case, and that the court would be duty bound to and would set aside as unsupported by the evidence a verdict in his favor should the jury return one, denied plaintiff's motion and granted defendant's. This appeal presents the single question whether the District Judge was right in his view, that since he disbelieved plaintiff's testimony, and had made his mind up that if plaintiff had a verdict he would not let it stand, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses.

"We think it beyond question that he was not. District Judges are pronouncing no mere rigmarole when, in law cases, they charge jurors that they are the sole and exclusive judges of the credibility of the witnesses, and the weight to be given to their testimony. They are setting forth the very substance of a jury trial as guaranteed by the Seventh Amendment to the Constitution. Its purpose and aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall not assume, directly or indirectly, to take from the jury or to itself such prerogative."

See *Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874; *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437.

It is submitted that it is important to preserve the constitutional right to the jury trial to all litigants.

5. In the event certiorari is granted, petitioner desires also to argue the proposition that this action is not barred by the Statute of Limitations running against the Ohio Casualty Insurance Company, the surety on the bond of Deputy Sheriff Bastrup, who left Wisconsin three months after the incident giving rise to this action and on whom

service could not be made in Wisconsin. However, service was made within 6 years, and on or about January 30, 1961, on Bastrup in California, and on Ohio Casualty Insurance Company in Wisconsin, the surety who with the principal Bastrup was jointly and severally liable on the bond for any breach.

It has been held that where there is a joint and several liability of a bondsman, and the statute is tolled as to the principal, it is also tolled as to the surety.

50 Am. Jur. paragraph 184, page 1024.

While the law of the state of the forum governs the application of the Statute of Limitations which is applicable to actions for violation of civil and constitutional rights, where no period has been prescribed by the federal statute, it would appear desirable to have it definitely determined where possible, which of conflicting statutes is applicable.

Wisconsin Statute of Limitations applicable to false imprisonment, Wisconsin Statute 330.21(2) is two years.

The limitation on an action against the sheriff for liability incurred by doing an act in his official capacity and in virtue of his office, or omission of an official duty is three years, Wisconsin Statute 330.20(4).

However, there is a six-year limitation upon a liability created by statute when a different limitation is not prescribed by law. Wisconsin Statute 330.19(4).

In *Smith v. Cremins*, 308 Fed. 2d 187 (9th Circuit), in discussing the statute of limitations applicable to section 1983, the court said at page 189 and following:

> "Since the Civil Rights Act contains no provision limiting the time within which an action may be brought under Section 1983, the applicable period of

limitation is that provided by the statutes of California—the State in which the present action arose and the District Court was located. The District Court held that the appropriate California statute of limitations is California Code of Civil Procedure, Sections 340(3) and (6), which provides a one-year period applicable to actions for assault, battery, false imprisonment, and certain actions for damages for seizure of property. Appellant asserts that the appropriate California statute is Section 338(1) of the California Code Procedure, which provides that actions of 'upon a liability created by statute' must be brought within three years.

"There are no decisions directly in point, and those most nearly analogous are inconclusive. The Court of Appeals for the Second Circuit, without discussion, has applied the New York 'liability created by statute' limitation to an action under the Civil Rights Act, and the Court of Appeals for the Seventh Circuit has indicated that it would have applied that limitation to such an action had one been available in the statutes of Illinois. The Tenth Circuit, on the other hand, has applied the Kansas statute of limitations applicable to actions 'for injury to the rights of another, not arising on contract.'

"(4) In determining which period of limitation to apply to an action under a particular federal statute, the federal court accepts the state's interpretation of its own statutes of limitation, but determines for itself the nature of the right conferred by the federal statute.

"The California courts have held that an action is based 'upon a liability created by statute,' within the meaning of Section 338(1), if the liability would not exist but for statute. Or, conversely, an action is not based 'upon a liability created by statute' if the right is one which would exist at common law in the absence of statute. Though broadly stated, the distinction drawn is sufficiently discriminating for the present case.

"Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability. As Mr. Justice Harlan recently suggested, 'a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act might constitute both a state tort and the deprivation of a constitutional right.'

"(5) Practical considerations also suport the selection of California's 'liability created by statute' limitation. According to appellees' analysis, the single cause of action under the Civil Rights Act alleged in the complaint includes three distinct causes of action under State law and calls for the application of two distinct State statutes of limitations; appellant suggests still another possibility. Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitations applicable to each state-created right were applied to the single federal cause of action.

"Reversed and remanded."

"It is generally true that rights created by federal statutes do not have exact common-law equivalents, and for this reason, as one commentator has observed the '"liability created by statute" provision has almost invariably been chosen by federal courts sitting in states which include it in their limitation statutes.'

53 Colum. L. Rev. 68, 69 (1953). See, *e.g.*, *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783 (2nd Cir. 1951); *Sackow Borax Mines Consol. Inc.* v. *Borax Consol., Ltd.*, 185 F. 2d 196, 207 (9th Cir. 1950); *Culver* v. *Bell & Loffland, Inc.*, 146 F. 2d 29 (9th Cir. 1944); *Donald* v. *Bird*, 85 F. 2d 663 (9th Cir. 1936); *Alvado* v. *General Motors Corp.*, 194 F. Supp. 314 (S.D. N.Y. 1961); *Farris* v. *San Diego Fed. Sav. & Loan Ass'n*, 140 F. Supp. 703 (S.D. Cal. 1956). See also 63 Harv. L. Rev. 1176, 1196 (1950)."[28]

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Statutes.

R. S. #1979, 42 U.S.C. #1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

Wisconsin Statute 59.22 Liability for appointees' acts; bonds

(1) Except as provided otherwise in subsection (3), the sheriff shall be responsible for every default or misconduct in office of his undersheriff, jailer and deputies during the term of his office, and after the death, resignation or removal from officer of such sheriff as well as before; and an action for any such default or misconduct may be prosecuted against such sheriff and his sureties on his official bond or against the executors and administrators of such sheriff.

(2) The sheriff may require his undersheriff, jailer and every deputy who is not required by subsection (3) to furnish an official bond, before entering upon the duties of his office, to execute and deliver to him a bond in such sum and with such sureties as he may require, conditioned for the faithful performance of his official duties; and every default or misconduct of such undersheriff or deputy for which the sheriff shall be liable shall be a breach of such bond.

(4) In counties having a population of less than 200,000 in which a civil service ordinance covering sheriff's deputies and jailers is in effect pursuant to the provisions of § 59.21(8) or § 59.07(20), the sheriff shall not be financially responsible for the acts, defaults or misconduct

in office of either his jailer or his deputies, appointed under the provisions of § 59.21(8) or § 59.07(20), except where such deputy or jailer acts under the express direction of the sheriff. Each such deputy and jailer shall execute and file an official bond and shall be liable for his acts, defaults or misconduct in office in the same manner and to the same extent that the sheriff and his executors and administrators would otherwise be liable, and actions therefore shall be prosecuted directly against such deputy or jailer and the surety on his official bond. The official bond required shall be in such principal amount as the county board shall determine and shall have a licensed surety company as surety. The cost of any such bond shall be paid by the county.

Wisconsin Statute 330.21 Within two years

(2) An action to recover damages for libel, slander, assault, battery or false imprisonment.

Wisconsin Statute 330.20 Within three years

(1) An action against a sheriff, coroner, town clerk, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office or by the omission of an official duty, including the nonpayment of money collected upon executions; but this subsection shall not apply to an action for an escape.

Wisconsin Statute 330.19–Within 6 years; foreign limitation; 2-year and one-year notices of injury or damage.

(4) An action upon a liability created by statute when a different limitation is not prescribed by law.

APPENDIX B.

OPINION OF THE TRIAL COURT.

In his amended complaint filed January 24, 1961, the plaintiff has joined Ohio Casualty Insurance Company as a defendant, alleging that that company was surety on the bond of the other defendnts and was liable for all damages incurred by the plaintiff as a result of "a breach of said bond by the defendants." The plaintiff's cause of action is for false arrest and imprisonment, that is, Count 1 and apparently for violation of the Civil Rights Act, which is Count 2.

The only bond issued by Ohio Casualty with which we are concerned, Bond No. 60321-3, provided that that company bound itself to pay to Kenosha County the amount of any loss which the County's employees therein named, including Schreck and Bastrup and Schmitt caused to Kenosha County because of failure to perform their duties and to account for moneys which come into their hands as employees. The bond further provided that the company would pay any persons entitled thereto any damage sustained as a result of any defalcation in handling trust funds.

It is clear that the bond does not, by its terms, give the plaintiff or any third party the right to sue the Ohio Casualty Insurance Company directly for damages occasioned by false arrest or imprisonment or violations of their constitutional rights arising from the actions of the defendants who are covered by the bond. The bond indemnifies Kenosha County, which has not been sued by the plaintiff in this or in any other action, against losses it, and it alone, suffers because of failure of persons named therein to perform their duties. Kenosha County is the only party authorized to sue directly on the bond under such circumstances. While the bond does give third parties a right to sue directly, this right is given only when such third parties assert a loss resulting from defalcation in the handling of trust funds by the persons named in the bond. No such loss is here claimed.

Now, then, as to the contention of the plaintiff's counsel: Despite the provisions of this bond, the plaintiff argues that it must be deemed an official bond by reason of Section 19.01(2m), Wisconsin Statutes, and must be deemed to contain all the provisions of Section 19.01(2).

While Section 59.22 (4), Wisconsin Statutes, required the deputies, whose acts plaintiff here complains of, to file an official bond, the plaintiff has not shown that the Ohio Casualty bond was "purportedly given as an official bond," as Section 19.01 (2m) requires.

We cannot impose upon Ohio Casualty Company the conditions and provisions required in Section 19.01(2) without a showing that the Ohio Casualty intended to issue an official bond.

For that reason, the motion of the defendant to dismiss all of the action as to the Ohio Casualty Insurance Company will be granted.

This defendant, Sheriff of Kenosha County at the time of the plaintiff's arrest and imprisonment, is not charged by the plaintiff with having personally participated in the conduct which the plaintiff claims violated his constitutional rights and constituted false arrest and imprisonment.

As we understand, the plaintiff claims, however, that Sheriff Marshall had a duty to appoint qualified persons as investigators and deputies and failed to perform that duty by appointing the persons of whose conduct plaintiff here complains, and contends that he is liable for damages occasioned by their conduct.

Sheriff Marshall did not, however, appoint the persons the plaintiff claims wrongfully arrested and detained him, those persons being civil service appointees or appointments.

There is no evidence tending to show that he should have had knowledge on March 13th and March 14th, 1955, that they were qualified and that he was negligent in keeping them on the staff.

Section 59.22(4), applicable here, provides that the Sheriff shall not be responsible for the acts, defaults or misconduct of his jailer or deputies unless they act under his express direction.

There is absolutely no evidence shown here that Sheriff Marshall gave express direction regarding the plaintiff's arrest and detention. His testimony as to the establishment of general procedure to be followed in every case does not constitute in this Court's mind what would constitute an express direction in this case which would subject him to liability for the acts of others in his Department.

The motion for a directed verdict dismissing the case as to James A. Marshall, former sheriff of Kenosha County, will be granted.

The Court will state that in testing this case this Court has applied what it believes to be the proper standards at this particular time in giving the most favorable intendment to the case that the plaintiff has submitted, that there is no justification for submitting it to the jury in respect to the two defendants I have so stated. Any verdict that would be returned that was favorable to the plaintiff would be unsupported on the record of this case.

The Court: Well, now, in respect to the motion for a directed verdict in relation to the defendant, William Schmitt, once again the Court is going to view the testimony as it appears most favorable to the plaintiff upon whom the burden rested. Very clearly the plaintiff has narrowed the proof to the Sunday afternoon, and the only testimony with relation to Mr. Schmitt is that after the arrest at the farm or the apprehension and taking into custody, that after the transportation to the Kenosha County Jail, and after the booking, and the turnover of the valuables, and the rest, that then for the first time comes any mention of William Schmitt and his activities, he being described as the person who escorted him to the cell and locked the door. Now, that is one aspect of the proof. That is the only one as to his participation in anything occurring on Sunday.

Now, then, of course that is vigorously, strongly denied and the Court, if this matter were submitted to the Court alone, would have no hesitancy in finding that Chief Investigator Schmitt was where he stated he was in Illinois, but taking the testimony for what it is, this Court reads that as constituting nothing whatsoever as actionable or giving right to any claim on the part here of the plaintiff in respect to William Schmitt.

Now, then, the testimony with respect to Monday is most clear. The evidence is that there were certain cards —we will refer to them as identification cards—and perhaps a badge or two that were on Chief Investigator Schmitt's desk the next day. The testimony is that he called two of the agencies or associations to make some determination of that. He was advised to hold them up, and the testimony did show that from the time somewhere in mid March—13th of March—they were retained in Kenosha at the Sheriff's office, I believe, and were thereafter returned about mid June. But as against that as being some invasion of rights or deprivation or some cause for grievance, there are two answers to that: (1) is the plaintiff has stated that he suffered no damage by reason of being deprived of their use: and (2) that he has described very clearly and I think, understandably that their usage—at least the highest and best use of them—would be to try to avoid some rather unwholesome purposes of influencing arrests in traffic cases, to swing or to carry the inference of prestige under such circumstances. This Court thinks it would be absurd to submit that part of it to the jury.

What guides me at this particular time—certain Rules I cite to be 108 Fed. 2d, 363 at page 365, *Nelson v. Business Men's Assurance*. "A question of law is thus presented which calls for a consideration of the record, not for the purpose of weighing the evidence, but for the purpose of determining whether there was some evidence. In the consideration if such a question, it is the duty of the court to take that view of the evidence, and all the inferences that may properly be drawn therefrom most favorable to the plaintiff, and if the evidence is if such a

character that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions, then the case should be submitted to the jury."

It is the Court's reaction to all of the testimony, which was followed very carefully, that the evidence in this case is of such character that reasonable men reach just one conclusion, and that is that there is no claim or damage sustained by the plaintiff here.

There is still a further rule (267 F. 2d 66 at 68); "Under either the federal rule or the Wisconsin rule a 'scintilla' of evidence is not sufficient to require the submission of an issue to a jury. The more reasonable rule is 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' Further, while we must consider the evidence in the light most favorable to the plaintiff, as Judge Lindley pointed out in *Shaw* v. *Edward Hines Lumber Co.*, 7 Cir., 1957, 249 F. 2d 434, 439: 'This does not mean that we may ignore uncontradicted, unimpeached evidence supporting defendant's position.'"

All of these factors the Court has taken into consideration and, therefore, in respect to William Schmitt, the motion for a directed verdict is granted and the Court now orders that the case be dismissed upon its merits with costs to the defendant.

Mr. Fisher: The Court has not ruled on the Count 2 of the complaint alleging the violation of the constitutional rights here.

The Court: Well, the Court has stated that with respect to Count 1 will also be applicable to Count 2.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13799 SEPTEMBER TERM, 1962, JANUARY SESSION, 1963

JOHN R. CZAP, JR.,
Plaintiff-Appellant,
v.
JAMES A. MARSHALL, WILLIAM P. SCHMITT, HAROLD ALFRED BASTRUP, RICHARD ROE and THE OHIO CASUALTY INSURANCE COMPANY, a corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

February 21, 1963

Before HASTINGS, *Chief Judge*, CASTLE and MAJOR, *Circuit Judges*.

MAJOR, *Circuit Judge*. This action was commenced March 11, 1957, by plaintiff, John Czap, Jr., to recover damages against defendants, James A. Marshall and William P. Schmitt. On January 24, 1961, an amended complaint was filed by which Harold Alfred Bastrup and The Ohio Casualty Insurance Company, a corporation, were added as defendants.

The action in the main is based upon the contention that plaintiff was falsely arrested, imprisoned and confined in jail for an unreasonable time without being taken before

a magistrate, with the opportunity afforded to give bond. He also claims that his civil rights as guaranteed by the laws and Constitution of the United States were violated.

The occurrence and incidents giving rise to the action took place on Sunday, March 13, 1955, at a farm located in Kenosha County, Wisconsin, owned and operated by plaintiff's parents, Mr. and Mrs. John Czap, Sr. A public sale previously advertised was to take place on that day. Plaintiff drove from his home in Chicago and appeared at the Czap home shortly before the time fixed for commencement of the sale. At that time there were assembled several persons, including an auctioneer, plaintiff's parents, two sisters and perhaps other relatives. Sometime after noon Bastrup and Schreck, both deputy sheriffs, arrived in a squad car. They talked to numerous persons, including members of the Czap family. Subsequently, they arrested plaintiff and took him in a squad car to the Kenosha County jail, where he was committed and retained until his release the next morning by order of the district attorney. The officers had no warrant for plaintiff at the time of his arrest and none was subsequently issued.

At the conclusion of plaintiff's case, which was tried to a jury, the Court denied defendants' motion for a directed verdict. However, at the conclusion of the trial, the Court allowed a similar motion, directed a verdict for the defendants and entered judgment accordingly. From this judgment the appeal comes to this Court.

It is appropriate to note in the beginning that neither of the two arresting officers, Bastrup and Schreck, was a party to the action at the time of the trial. Bastrup long before he was named as a defendant had become a resident of the State of California. Following a pre-trial conference, the Court, on April 18, 1961, entered an order of dismissal as to him on the ground that the Court, for lack of service, was without jurisdiction. The order recites that the parties agreed to such dismissal. Schreck, the other arresting officer, was deceased and not named as a defendant.

Plaintiff's appeal from the judgment of dismissal as to Bastrup is clearly without merit. The trial Court had no jurisdiction as to him and neither does this Court.

Defendant Marshall at the tme of the occurrence was county sheriff. It is contended that he was liable and responsible for the acts of the arresting officers and that he was derelict in his duties as sheriff in failing to have plaintiff taken before a magistrate within a reasonable time. As to defendant Schmitt, a deputy sheriff, it is contended that he was liable because of certain activities in connection with plaintiff's commitment. As to defendant The Ohio Casualty Insurance Company, it is contended that it as the surety on the bond of Schmitt and Bastrup was liable for their alleged unlawful activities.

We have read the entire record, including the exhibits and the testimony heard at the trial, and are convinced that the correct result was reached by the District Court. The only question of any consequence is whether that result should have been reached in the form of a directed verdict. In considering this issue, we must keep in mind, of course, the rule that a question for the jury is presented if there is substantial evidence supporting plaintiff's claim when viewed in the light most favorable to him.

Turning first to the circumstances in connection with plaintiff's arrest, the record presents a rather unusual situation. Plaintiff testified in support of his case, and his testimony standing alone, if believed, would have presented a submissible issue. However, Plaintiff had taken the deposition of Bastrup in California (not as an adverse party), and introduced such portions of the deposition as were thought favorable to him. Thereupon, defendant offered and the Court admitted, over the objection of plaintiff, the remainder of the deposition. No question is raised here as to the propriety of the Court's ruling in this respect.

We shall attempt to summarize in brief form the testimony of plaintiff and Bastrup as to the circumstances connected with plaintiff's arrest. In connection with plain-

tiff's version, it is relevant to note some background. Previous to his arrest, plaintiff had been engaged in a controversy with his family regarding his claim to certain property in possession and control of his parents. In fact, a case relative thereto was pending in a State Court. At one hearing in connection therewith, plaintiff in the presence of the Court had threatened to kill his mother. Plaintiff learned of the auction sale, advertised by his parents to be held March 13, 1955. On the previous day, he procured from a State Court Judge an order directed at his parents to show cause why they should not be enjoined from selling, transferring or otherwise disposing of their property, except the order permitted the conduct of the sale as advertised but restrained the parents from disposing of the proceeds until further order of the Court. It appears that a copy of this order was served on his parents the day prior to the sale. (As far as the record discloses, the arresting officers previous to the day in question had no knowledge of this family controversy.)

As noted, plaintiff arrived at the farm shortly before the time the sale was to commence. Later, the arresting officers were cruising near the Czap farm received from the sheriff's office a radio report, "We are having trouble with Mr. Czap's son, would like to have squad car stop at the place." This was a telephone request made by the auctioneer at the Czap farm. In response thereto, the officers arrived at the farm sometime shortly after noon.

Plaintiff testified that he was in the yard when the officers arrived, and that immediately after learning his identity they took him in custody and forced him into the squad car. He emphatically denied that he had committed any offense, done any harm, threatened any person, or used any vulgar or profane language. In short, according to his testimony, he was as innocent and docile as any person could be.

Officer Bastrup testified that upon their arrival at the farm there was a large crowd of men, women and children in the yard and that he went into the house where plaintiff, his mother and sisters were engaged in an argument. He was told that plaintiff had come to the farm

for the purpose of stopping the auction, that he had beat his sister and that she wished to file a complaint against him. This statement was corroborated by the auctioneer. At that time Bastrup observed that the sister had bruises on her face and blood flowing from visible marks. Plaintiff left the house, and so did Bastrup.

The two officers talked to plaintiff in the yard concerning the family controversy, asked him not to create any further disturbance and to leave the property, as requested by his mother and sister. This he refused to do. Plaintiff produced certain identification cards and advised the officers that they did not know what they were doing. Plaintiff used much profanity and vulgar language in the presence of the crowd in the yard. His sister again told the officers that she wanted to sign a complaint and charge plaintiff with assault and battery. They told her that in order to do so she would have to go to the district attorney's office the following day.

Thereupon, the officers took plaintiff to the Kenosha County jail. Bastrup made out what is called an arrest sheet which, among other things, stated that plaintiff entered his mother's home and assaulted her and his sister, and "Arrested on complaint of mother and sisters who will come into the DA office and sign complaint. Relatives claim they are afraid of this man and he frequently carries a gun." The arresting officers had no further connection with the matter. Plaintiff was turned over to other officers and, after the performance of certain routine matters including the taking of his fingerprints and taking from his person certain so-called identification cards, he was committed to jail.

The District Judge, in connection with the dismissal of plaintiff's action, rendered an opinion in which he made no finding as to whether plaintiff's arrest was legal or illegal. Plaintiff here, however, devotes much of his argument in support of his contention that it was illegal and that all persons who participated in or were connected with his commitment and detention were responsible. In our view, it is not open to serious doubt but that the arresting

officers were justified in making the arrest on the grounds that a disturbance of the peace had been committed by plaintiff in their presence and that they had good reason to believe that he had committed a felony by assaulting his sister. For them to have left the premises without arresting him would have been a clear dereliction of duty. Plaintiff's testimony is so patently untrue that it would not support a finding in his favor whether made by a jury or a court. We hold that his arrest was lawful, and it follows that his commitment to the county jail as a result of such arrest was also lawful.

As to defendant Marshall, plaintiff contends that under the common law of the State of Wisconsin a sheriff is responsible for the acts of his deputies. Even so, if plaintiff's arrest was lawful, as we have held, there would be no liability on the part of the sheriff. However, assuming for the moment that the arrest was unlawful, still there would be no liability on his part because the common law of Wisconsin has been superseded by a statutory provision which fixes the responsibility of a sheriff for the acts of his deputies. Section 59.22 (4) of the Wisconsin Statute, fixing the liabilities of a sheriff, provides:

"* * * the sheriff shall not be financially responsible for the acts, defaults or misconduct in office of either his jailer or his deputies * * * except where such deputy or jailer acts under the express direction of the sheriff."

There is not the slightest basis for a contention that the deputy sheriffs in arresting plaintiff acted "under the express direction of the sheriff."

Without going into details, it is sufficient to point out that the provision lastly quoted is a part of a broad Act relative to the duties, rights and obligations of a sheriff. Deputy sheriffs in a County such as Kenosha are Civil Service employees. They are not appointed by the sheriff and neither can they be discharged by him. While he is in office, if a vacancy occurs, the appointment must be made from an eligible list compiled by the Civil Service Commission. He can get rid of a deputy only by prefer-

ring with the Commission charges of misconduct and proof of the same. The situation is illustrated in the instant case where the arresting officers, Bastrup and Schreck, were deputy sheriffs both before and subsequent to Marshall's tenure as sheriff. He had nothing to do with the appointment of either. The legislature having imposed such restrictions upon the rights and privileges of a sheriff in relation to his deputies, it seems only reasonable that it should at the same time reduce his obligations and liabilities in respect thereto.

Marshall had nothing to do with the arrest; in fact, he did not know it had taken place until about 10 a.m. the following morning (Monday) when he learned from the arrest sheet (above referred to) that plaintiff was in jail and the reason for his arrest.

Defendant Schmitt, another deputy sheriff, also had nothing to do with plaintiff's arrest. It was only after plaintiff was taken to jail that Schmitt entered the case. Plaintiff testified that Schmitt was one of the persons who had charge of him until he was placed in jail—in fact, that Schmitt was the person who placed him in jail and locked him in a cell. Schmitt testified that he was not at the sheriff's office or the jail at any time on Sunday, the day of the arrest, but that he spent the day at his sister's home at Oak Park, Illinois. The trial Judge stated that he believed the testimony of Schmitt in this regard. Assuming, however, that Schmitt placed plaintiff in jail and locked him in a cell, there would be no liability on his part from that act alone after plaintiff had been brought to the jail as the result of a lawful arrest.

Plaintiff also argues that Marshall and Schmitt were responsible for and therefore liable because of the unreasonable delay in taking him before a magistrate where he could be informed of the charges against him, with the opportunity to give bond. The rule in Wisconsin in this respect appears to be no different from that followed in courts generally, both State and Federal. For instance, in *Schoette* v. *Drake*, 139 Wis. 18, 120 N. W. 393, it is held

that it is the duty of the arresting officer to take the prisoner before a magistrate for bail without unreasonable delay. This requirement is analogous to that contained in Rule 5 (a) of the Federal Rules of Criminal Procedure where it is provided, "* * * any person making an arrest without a warant shall take the arrested person without unnecessary delay before the nearest available commissioner * * *" What constitutes unreasonable or unnecessary delay must be determined from the facts and circumstances of each case. *Holt* v. *United States*, 280 F. 2d 273, 274; *Muldrow* v. *United States*, 281 F. 2d 903, 906 (and cases therein cited and discussed). In *Holt*, the defendant was arrested on Sunday and not taken before the commissioner until the following Tuesday; in *Muldrow*, the defendant was arrested on Friday and not taken before the commissioner until the following Monday. It was held on the facts of each case that the defendant was taken before a commissioner without "unnecessary delay."

In the instant case, plaintiff, according to the arrest sheet, arrived at the jail at 2:50 p.m. Sunday and was discharged by the district attorney about noon on the following day, without a complaint being filed against him. The record is not clear as to exactly what happened on that morning. It does reveal that plaintiff's mother and sister promised the arresting officers that they would come to the district attorney's office at that time for the purpose of preferring charges. It also indicates that they appeared but refused, as often happens in family rows, to sign a complaint. In any event, plaintiff was ordered discharged by the district attorney. It is true, as plaintiff points out, that he never was taken before a magistrate, as the law requires. It is not discernible, however, how plaintiff sustained any damages by being taken before the district attorney, who ordered his discharge, rather than before a magistrate, who could have rendered him no more favorable service. Under the circumstances, we hold that plaintiff was not unreasonably detained and that his claim for damages in this respect is without merit.

Plaintiff also asserts his rights were violated by Schmitt for failure to return to him promptly certain so-called identification papers which were taken from his person at the time of his arrest or shortly thereafter. Some of these papers showed that plaintiff was a member of certain police organizations in Chicago. Schmitt called the police department and the sheriff's office in Chicago to inquire about plaintiff. He was informed that plaintiff was neither a policeman nor a deputy sheriff, and they requested that the papers found on plaintiff be sent to them for investigation. Some three months later they were returned to Schmitt, who delivered them to plaintiff or his representative. Plaintiff admitted that he had not had any use for these papers from the time they were taken from him until they were returned and that he had sustained no damages in that respect. He also admitted in effect that the best use he had for the papers was to escape being charged with a speeding violation. Assuming, without deciding, that the taking of these papers from plaintiff and their retention for several weeks was a violation of his rights, according to his own testimony it was a wrong from which he sustained no damages.

This brings us to the defendant, The Ohio Casualty Insurance Company, whose bond by its terms bound the company to pay "to the County of Kenosha, Wisconsin, called the employer, the amount of any loss which any employee named in the schedule may, while in the position named in the schedule, cause to the employer, not exceeding the amount set opposite the name of such employee." Deputy sheriffs named in the schedule, among others, were Harold Bastrup and Kermit Schyeck, the arresting officers, and defendant William P. Schmitt. This bond by its express terms was only for the protection of the County of Kenosha and not of third persons. Plaintiff argued in the court below, as he does here, that the bond in question must be treated as an official bond and must be construed as embodying the provisions of the Wisconsin Statute which require the execution and filing of an official bond for the protection of persons who may sustain damages as the result of a deputy sheriff's misconduct.

We see no reason to pursue further plaintiff's contention in this respect. The issue as to liability on the part of Ohio has become moot. Even though its bond be treated as official and construed to include the provisions of the Wisconsin Statute to protect third persons from the unlawful acts and misconduct of deputy sheriffs, there could be no liability on its part in the instant situation. This is so because we have concluded and so hold that there was no unlawful or wrongful conduct on the part of any official who participated in the arrest, commitment and detention of plaintiff.

In view of what we have decided on the material issues of the case, plaintiff's contention that he was deprived of his civil rights, in violation of the Federal Constitution and Law, must be rejected. *Monroe et al.* v. *Pape et al.*, 365 U. S. 167, so strongly relied upon, is clearly without application.

The judgment appealed from is

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago 10, Illinois

Thursday, February 21, 1963

Before
Hon. John S. Hastings, Chief Judge
Hon. Latham Castle, Circuit Judge
Hon. J. Earl Major, Circuit Judge

John R. Czap, Jr., Plaintiff-Appellant, vs. James A. Marshall, William P. Schmitt, Harold Alfred Bastrup, Richard Roe and The Ohio Casualty Insurance Company, a corporation, Defendants-Appellees.	Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 13799

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, May 8, 1963

Before
Hon. John S. Hastings, Chief Judge
Hon. Latham Castle, Circuit Judge
Hon. J. Earl Major, Circuit Judge

John R. Czap, Jr.,
Plaintiff-Appellant,

No. 13799 vs.

James A. Marshall, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.